UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

OZBURN-HESSEY LOGISTICS, LLC

and Cases 26-CA-023497
26-CA-023539
26-CA-023576

UNITED STEEL, PAPER and FORESTRY,
RUBBER, MANUFACTURING, ENERGY, ALLIED
INDUSTRIAL and SERVICE WORKERS INTERNATIONAL
UNION, AFL-CIO-CLC

OZBURN-HESSEY LOGISTICS, LLC

and Cases 26-CA-023675
26-CA-023734

UNITED STEEL, PAPER and FORESTRY
RUBBER, MANUFACTURING, ENERGY, ALLIED
INDUSTRIAL and SERVICE WORKERS INTERNATIONAL
UNION, AFL-CIO-CLC

William Hearne, Esq.,
for the General Counsel.
Ben Bodzy, Esq.,
for the Respondent.
Benjamin Brandon,
for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. These supplemental proceedings were tried before me in Memphis, Tennessee, on August 30-31, and September 13, 2016. [1] In Cases 26-CA-023497, 26-CA-023539 and 26-CA-023576, a compliance specification and notice of

[1] By agreement of the parties, I held the September 13 session by videoconference from the NLRB Regional Office in Cleveland, Ohio. The parties and the witnesses were located in the NLRB subregional office in Memphis, Tennessee.

hearing issued on April 29, 2016. The compliance specification alleges the amount of backpay due under the terms of the Board's decision and order in *Ozburn-Hessey Logistics, LLC*, 357 NLRB 1632 (2011). The Board's order was enforced by the U.S. Court of Appeals for the District of Columbia in *Ozburn-Hessey Logistics, LLC,* v. *NLRB*, 609 Fed. Appx. 656 (2015).

In Cases 26-CA-023675 and 26-CA-023734, a compliance specification issued on April 29, 2016. The compliance specification alleges the amount of backpay due under the terms of the Board's decision and order in *Ozburn-Hessey Logistics, LLC*, 357 NLRB 1456 (2011). The Board's order was enforced by the U.S. Court of Appeals for the District of Columbia in *Ozburn-Hessey Logistics, LLC, v. NLRB*, 605 Fed. Appx. 1 (2015).

In making my findings and conclusions, I have considered the entire record,[2] and have had an opportunity to observe the demeanor of the witnesses at the hearing. I have also considered the briefs filed by the General Counsel and the Respondent.

In the Board's decision in *Ozburn-Hessey Logistics, LLC*, 357 NLRB 1632 (2011), it found that the Respondent had discriminated against employees Renal Dotson, Jerry Smith, and Carolyn Jones, a violation of Section 8(a)(3) and (1) of the Act. In order to remedy these unfair labor practices, the Board ordered the Respondent to take certain affirmative action, including, inter alia, making Dotson, Smith, and Jones whole, with interest, for any loss of earnings and other benefits they suffered as a result of the discrimination against them.

In the Board's decision in *Ozburn-Hessey Logistics, LLC*, 357 NLRB 1456 (2011), it found that the Respondent had discriminated against employees Glorina Kurtycz and Glenora Rayford, in violation of Section 8(a)(3) and (1) of the Act. In order to remedy these unfair labor practices, the Board ordered the Respondent to take certain affirmative action, including, inter

[2] On November 9, 2016, the General Counsel, without opposition, filed a motion to correct the exhibits contained in the record in certain respects. The General Counsel attached to his motion a complete version of GC Exh. 1(c), Exhibit 3 which concerns the backpay calculations for discriminatee Renal Dotson set forth in the compliance specification in 26-CA-023497 et al. The version of this document that was originally contained in the exhibit file was incomplete. The General Counsel also seeks to have two other exhibits contained in the record to be placed in the proper order. At the hearing, the General Counsel amended the compliance specification in Case 26-CA-023497 et al., with respect to Jerry Smith. The document containing the revision was labeled by counsel for the General Counsel as "Exhibit 4-Revised." In preparing the exhibits, rather than attaching this document to the compliance specification (GC Exh. 1(c)), the reporting service placed this exhibit behind GC Exh. 4. Similarly, the General Counsel amended the compliance specification in 26-CA-023675, et al., with respect to Glorina Kurtycz. The document containing the revision was labeled by counsel for the General Counsel as "Exhibit 2-Revised." Rather than attaching this document as an exhibit to the compliance specification (GC Exh. 1(h)), the reporting service placed this exhibit behind GC Exh. 2. I grant the General Counsel's motion in all respects. Accordingly, I have substituted the complete version of GC Exh. 1(c), Exhibit 3 for the original one that was incomplete. I have also placed the revised exhibits to the compliance specifications noted above that were incorrectly placed in the exhibit file in the proper order.

alia, making Kurtycz and Rayford whole, with interest, for any loss of earnings and other benefits they suffered as a result of the discrimination against them.

The compliance specification in 26-CA-023497, et al., alleges that the backpay period for Renal Dotson is from August 28, 2009, until April 11, 2011, and that the Respondent owes Dotson $33,816 in backpay, plus interest (GC Exh. 1(c), Exhibit 3). This compliance specification also alleges, as amended, that the backpay period for Jerry Smith was from August 28, 2009, to April 15, 2011 and that the Respondent owes Smith $8383 in backpay, plus interest (GC Exh. 1(c), Exhibit 4-Revised). Finally, the compliance specification alleges that the backpay period for Carolyn Jones was from August 29, 2009, to September 4, 2009. At the hearing the parties stipulated that Jones was owed $502.96 in backpay, plus interest and excess tax liability (Tr. 7). Thus, there are no contested issues regarding Jones and I will issue an appropriate order regarding the $502.96 that is owed to her in backpay, plus interest and excess tax liability.

The compliance specification in 26-CA-023675 et al., as amended, alleges that the backpay period for Glorina Kurtycz was from March 2, 2010, to April 15, 2011, and that the Respondent owes Kurtycz $17,672 in backpay, plus interest (GC Exh. 1 (h), Exhibit 2-Revised). This compliance specification also alleges that the backpay period for Glenora Rayford [3] was from November 18, 2009, until December 31, 2011, and that the Respondent owes Rayford (Whitley) $11,281 in backpay, plus interest.

The Respondent, in its answers to both compliance specifications, admitted that the method of calculation of backpay for Dotson, Smith, and Kurtycz was appropriate. At the hearing, the parties also entered into a stipulation to that effect. In its answers, however, the Respondent denied that Dotson, Smith, and Kurtycz were eligible for overtime and double time pay during the backpay period because the average weekly hours for each of them was less than 40 hours per week (GC Exhs. 1(e) and (j)).

The Respondent also asserts that Dotson did not adequately mitigate damages by his failure to exercise reasonable diligence in searching for work during the backpay and thus is not entitled to any backpay. With respect to Smith, the Respondent asserts that his backpay must be reduced because he willfully concealed interim earnings and because he voluntarily left an interim employment position and returned to that employer at a lower rate of pay. Finally, the Respondent asserts that the backpay owed Kurtycz should be reduced because she failed to mitigate damages by making a reasonable search for interim employment.

With respect to Rayford, the Respondent's answer denied that the compliance specification in 26-CA-023675 set forth an appropriate formula regarding gross backpay. The Respondent also contends that the backpay period should end on April 13, 2011, by virtue of Rayford's alleged receipt of a letter from the Respondent offering her an opportunity for overtime employment in the Respondent's Remington department.

.

[3] The record indicates that Glenora Rayford was married on May 10, 2012 and was thereafter known as Glenora Whitley. Later in this decision I will, at times, refer to Rayford as Whitley.

General Principles

The Board has noted a finding that a loss of employment is the result of an unfair labor practice is presumptive proof that some backpay is owed. *St. George Warehouse* (*St. George Warehouse I*), 351 NLRB 961, 963 (2007). In a compliance proceeding the General Counsel has the burden of proving the amount of gross backpay due each discriminatee. *Id*; *Florida Tile Co*., 310 NLRB 609 (1993). In *Performance Friction Corp.*, 335 NLRB 1117 (2001) the Board noted:

> Both the Board and the Court have applied a broad standard of reasonableness in approving numerous methods of calculating gross backpay. Any formula which approximates what the discriminatees would have earned had they not been discriminated against is acceptable if not unreasonable or arbitrary in the circumstances. *La Favorita, Inc*., 313 NLRB 902, 903 (1994), enfd. mem. 48 F.3d 1232 (10th Cir. 1995). The Board is required only to adopt a formula which will give a close approximation of the amount due; it need not find the exact amount due. *NLRB v. Overseas Motors*, 818 F.2d 517, 521 (6th Cir. 1987), citing *NLRB* v. *Brown & Root, Inc*., 311 F.2d 447, 452 (8th Cir. 1963)

After the General Counsel has established the amount of gross backpay due each discriminatee, the Respondent then has the burden of establishing affirmative defenses to mitigate its liability, including a willful loss of earnings. *St. George Warehouse I*, supra, at 963; *Grosvenor Resort*, 350 NLRB 1197, 1198 (2007). In St. *George Warehouse I*, the Board held that once a respondent produces evidence that there were substantially equivalent jobs in the relevant geographic area available for a discriminatee during the backpay period, the General Counsel has the burden of producing evidence regarding a discriminatee's job search.

Whether Dotson, Smith, and Kurtycz are entitled to Backpay for Overtime and Double Time Hours

As noted above, in its answers to the compliance specifications, the Respondent contends that Dotson, Smith and Kurtycz are not owed backpay for overtime and double time hours because the average weekly hours for each discriminatee was calculated to be under 40 hours per week. In support of this portion of the gross backpay formula, the General Counsel called Debra Warner, the compliance officer for Region 15,[4] who performed the backpay calculations for all of the discriminatees in this proceeding. Warner has been the compliance officer since 2006. Warner credibly testified that the information provided by the Respondent for each of the comparable employees used to calculate the backpay for Dotson, Kurtycz, and Smith was provided to her in a lump sum of regular hours, overtime hours and double time hours. Because of the manner in which the information was provided, Warner could not be sure when the overtime and double time hours were earned. According to Warner, some of the comparable employees may have worked for 46 hours in one week and then 35 in another. When she averaged the amount of hours it came up to less than 40 hours of regular hours. Warner testified

[4] I take administrative notice of the fact that by the time the compliance specification issued, the Memphis office of the NLRB had become a subregional office of Region 15. At the time of the litigation of the underlying unfair labor practice proceeding, the Memphis office was Region 26.

she had no way to know precisely when overtime was worked. However, from the information provided to Warner, the comparable employees worked overtime and double time hours during the backpay period of each of the discriminates named above. Because there was evidence that comparable employees had worked overtime and double time during the backpay period, Warner concluded that the overtime and double time would also have been available to the discriminatees. According to Warner, because the overtime and double time hours could not be assigned to a particular pay period she calculated the overtime and double time pay for each discriminatee utilizing the same formula as she had for computing the regular hours.

While the Respondent denied in its answer to the specifications that it was appropriate to to include overtime and double time hours in the calculation of gross backpay, it failed to produce any evidence at the hearing to contradict the conclusions reached by Warner. In addition, it made no argument in its brief as to why the calculations in this regard were not appropriate.

As noted above, the Respondent provided evidence during the compliance investigation establishing that the comparable employees to Dotson, Smith and Kurtycz had worked overtime and double time hours during the backpay. Accordingly, I find that under the circumstances present in this case, that the formula applied by Warner regarding double time and overtime hours is reasonable and not arbitrary and was appropriately applied to Dotson, Smith, and Kurtycz in order to approximate the amount of gross backpay owed to them. *Performance Friction Corp*., supra.

Whether Dotson Engaged in a Reasonable Search for Interim Employment

As noted above, the Respondent contends that Dotson is not entitled to any backpay because he did not make a reasonable search for interim employment

Facts

According to the Board's decision in the underlying labor practice case, Dotson was employed as a "reach truck" driver in the Respondent's warehouse at the time that he was unlawfully discharged on August 28, 2009.[5] 357 NLRB at 1646. On April 15, 2011, Dotson was reinstated by the Respondent pursuant to a 10(j) injunction order issued by the Federal District Court for the Western District of Tennessee. Accordingly, the backpay period for Dodson extends from August 28, 2009 to April 15, 2011.

In support of its contention that Dotson and Kurtycz did not make a reasonable search for interim employment, at the trial the Respondent introduced classified ads from the Commercial Appeal, the newspaper in the Memphis metropolitan area, for the period between September 27, 2009 and April 3, 2011 (R. Exh. 6). The Respondent highlighted the ads which it claims are similar to those jobs the discriminatees performed for it. The Respondent also presented the testimony of Lisa Johnson, the Respondent's regional human resource manager. During the backpay period, Johnson was employed by Randstad, a temporary staffing agency, as a senior

[5] A "reach truck" is similar to a forklift except the driver stands when operating the equipment.

account manager. Johnson testified that a number of the positions highlighted by the Respondent in the classified ads set forth in Respondent Exhibit 6 are similar to the positions that the discriminatees performed at the Respondent. Johnson also testified, however that Kurtycz had not operated lift equipment for the Respondent and thus ads requiring forklift experience would not apply to Kurtycz. Johnson further testified that during the backpay period there were warehouse positions available in the Memphis metropolitan area. In this connection, she testified that at times during the backpay period she had between 100 and 150 employees working in warehouse positions in which she had placed them.

Pursuant to the framework established in *St. George Warehouse I*, supra, since the Respondent produced evidence that there were substantially equivalent jobs available for the discriminatees in the Memphis metropolitan area during the backpay period, the General Counsel called Dotson as a witness to testify about his search for employment during the backpay period. According to Dotson's credited and uncontradicted testimony, he was actively seeking work during the backpay period. Dotson further testified, however, that his ability to search for work was limited by his lack of transportation and the fact that he had no permanent residence during this period. According to Dotson, while he was working at the Respondent prior to his discharge in August 2009, he did not have an automobile but was able to get a ride to and from work from his girlfriend or coworkers. After his discharge he was unable to purchase a car to assist him in looking for work.

Dotson testified that shortly after his discharge, he had to move out of his apartment because he did not have money to pay the rent. For the remainder of the backpay period Dotson did not have a permanent address. He moved around among various family members and friends who would provide him with a place to live. During the period that he had no permanent address, Dotson used his mother's post office box to receive mail but was able to only occasionally check it because of a lack of transportation.

Because of his lack of transportation, Dotson had to rely on family members or friends who had transportation and were willing to drive Dotson around the Memphis area while he searched for work. Beginning in October 2009, Dotson lived off and on with a cousin in the Frayser area of Memphis. Dotson testified that there was no bus service in the area where his cousin's home is located.

Dotson also testified that he did not have a telephone during the backpay period in order to call potential employers. During the backpay period, at times he would use his uncle's cell phone to call employers, but the cell phone only provided 30 minutes of call time a month. Dotson listed his sister's cell phone number on applications because he did not have access to a phone on a regular basis. If a potential employer or temporary staffing agency would call his sister, she would have to try to find out where Dotson was living and contact him. Because of Dotson's lack of a cell phone or access to computer, he was unable to search online for jobs. Dotson further testified that he was unable to afford the newspaper in order to search classified ads.

Dotson kept a list of employers that he contacted in person during his search for work which he submitted to the Regional office on a regular basis throughout the backpay period. (GC

Exh. 3). This list reflects that on September 2, 2009, within 4 days of his unlawful discharge, Dotson began to contact potential employers in person. This list[6] reflects the following:

9-2-09	Collier Detail Shop	Nothing
9-4-09	Delta Lawn & Landscaping	Not hiring
9-9-09	Jack Morris Auto Glass	Not hiring
9-10-09	Big D's Auto Repair	Not hiring
9-14-09	Landscape Service Group	Not hiring
9-18-09	Tire World	Nothing
9-24-09	Finishing Touch	Not hiring
9-29-09	Acura of Memphis	Not hiring
10-8-09	Mo Money	Not hiring
10-16-09	Southland Racing Corp.	Not hiring
10-27-09	Talent Force	Not hiring
10-27-09	Preferable Staffing	Filled out an application
11-4-09	PMG Staffing, Inc.	Not hiring
11-19-09	AOS A-One-Staffing	Filled out an application
11-28-09	Ice Company	Not hiring
11-28-09	ABM Janitorial Service	Not hiring
1-4-10	B & B Auto Parts	Not hiring
1-4-10	Lane Auto Parts	Not hiring
1-13-10	Wise Staffing Service Inc.	Not hiring
1-15-10	Lawn Jox	Not hiring
1-27-10	Placement Priority	Not hiring
2-23-10	Lawn Care	Not hiring
3-11-10	Computer Works	Not hiring
3-26-10	Central Defense Security	
3-28-10	Flo-Glo	Not hiring
4-12-10	Enterprise	Not hiring
4-18-10	All in A Day	Filled out an application
4-29-10	Movers World Van Lines	Not hiring
5-3-10	Cal Western Packaging	Not hiring
5-14-10	National Civil Rights Museum	Not hiring
5-16-10	Allied Forces	

Dotson's job search list further indicates that from the time he was discharged until the end of April 2010 he went to the following job fairs:

11-6-09	St. Paul Job Fair	Not hiring too late
2-25-10	Memphis Goodwill Job Fair	Filled out an application
3-9-10	Spring Gate Rehabilitation Job Fair	Nothing good
3/11/10	McLane Job Fair	I did not have a resume.
4-26-10	Holiday In Job Fair	Filled out an application

[6] The portion of Dotson's list also contains the address, phone number, and the first name of the individual that Dotson spoke to at almost every potential employer.

Dotson was able to find work through a temporary agency, Staff Line, from July 18 until July 24, 2010, (GC Exh. 3) and earned $225, according to his statement of earnings from the Social Security Administration. (GC Exh. 2, p. 3.) Dotson's Social Security earnings report for 2010 also reflects that he earned $424.50 through another temporary agency, Labor Finders of Tennessee, Inc. (Labor Finders). Dotson's employment report that he submitted to the Region indicates that he worked for Labor Finders from October 4, 2010, through October 8, 2010. In addition, Dotson's Social Security earnings record reflects that in 2010 he earned $110.56 through Labor Ready Mid-Atlantic, Inc., although his employment and expense report that he submitted to the Region does not indicate specifically when this money was earned. Finally, Dotson's Social Security earnings report reflects that he earned $154.06 through Labor Finders in 2011. Dotson testified that the work he did through Labor Finders was detailing cars at the Memphis Auto Auction. Dotson further testified that the job ended when he was informed that the auction no longer needed employees through Labor Finders.

Dotson continued to search for employment in person after working temporarily through Staff Line in July 2010. In this regard, his employment report reflects the following: [7]

8-5-10	A & H Enterprises, Inc.	Not hiring
8-9-10	Sam's Club	Not hiring
8-10-10	Priority Placement	Not hiring
8-10-10	Logistic Corp.	Not hiring
8-12-10	Express Employment Professionals	Not hiring
8-12-10	Brickforce Staffing	Not hiring
8-13-10	ASAP	Not hiring
8-27-10	Smisco Volvo and Import	Not hiring
9-15-10	Roger & Son Shop	Not hiring
9-15-10	Ken Speed Shop	Not hiring
9-27-10	Stone River Pharmacy	Not hiring
10-14-10	Window World	Not hiring
10-26-10	Rent-a-Center	Not hiring
10-28-10	Jacob	Not hiring
11-10-10	Complete Auto Care	Not hiring
12-2-10	Salvation Army	Not hiring
12-2-10	Three Bear Production	Not hiring
1-18-11	Staff mark	Told to keep calling in for work.

Dotson further testified that during the backpay period he also applied in person at the following potential employers[8] but that he did not keep a record of the date that he visited those employers: Xclusive Auto Sales; Alexander Restaurant; Freeman Enterprises, Inc.; Regions; Stereo One, Inc.; and Games Plus.

[7] This portion of Dotson's employment and expense report contains the address of each potential employer he contacted.

[8] This portion of Dotson's employment and expense report also contains the address of each employer.

Analysis

In St. George Warehouse (*St. George Warehouse II)*, 355 NLRB 474, (2010), reaffirming and incorporating by reference 353 NLRB 497 (2008), enfd. 645 F.3d 666 (3d Cir. 2011), the Board reiterated the principles it applies in determining whether a discriminatee has made a reasonable search for work as follows:

> To be entitled to backpay, a discriminatee must make reasonable efforts to secure interimemployment. The discriminatee must put forth an honest, good faith effort to find work: the law does not require that the search be successful. Doubts, uncertainties and ambiguities are resolved against the wrongdoing respondent. *Midwestern Personnel Services*, 346 NLRB 624, 625 (2006) (citations omitted) 353 NLRB at 501.

The Board has also noted that even though a discriminatee must attempt to mitigate his or her loss of income, the discriminatee is held only to a reasonable standard rather than the highest standard of diligence. S*t. George Warehouse II,* supra, at 501; *Minette Mills, Inc*., 316 NLRB 1009, 1010 (1995); *Arlington Hotel Co*., 287 NLRB 851 (1987), enf. granted in part, 876 F.2d 678 (8th Cir. 1989). The Board has also held that the sufficiency of the discriminatee's efforts to mitigate backpay is determined with respect to the backpay period as a whole and is not based on isolated portions of the backpay period. *St. George Warehouse II,* supra*,* at 501; *Grosvenor Resort*, 350 NLRB 1197, 1198 (2007); *Arlington Hotel Co*., supra, at 852.

In the instant case, I find that Dotson engaged in a reasonable search for work. As noted above, Dotson began to seek interim employment within 4 days of his discharge. In *Grosvenor Resort*, supra, at 1199, the Board noted that if a discriminatee begins a reasonably diligent search within a 2-week period after his or her discharge, the backpay runs from the date of the unlawful discharge. After Dotson commenced his search for work in a timely manner, he continued to search for work throughout the backpay period, even though he was greatly limited by a lack of transportation and not having access to a phone on a consistent basis or any internet connection. Dotson personally visited approximately 54 employers during the backpay period seeking employment and went to 5 job fairs.

The Respondent focuses on brief periods of time during the backpay period when Dotson's employment report does not reflect that he was actively visiting potential employers. However, Dotson was severely hindered in his search for work by a lack of reliable transportation. In this regard, he had to rely on friends and relatives to drive him to potential employers because of his lack of an automobile. As noted above, Dotson had no permanent address during the backpay period and moved between the residences of various friends and relatives. At one of his temporary residences, there was no bus service in the area in which he was living at the time. The Board has recognized the limitations imposed by a lack of reliable transportation in considering whether a discriminatee has made a reasonable search for interim employment. *St. George Warehouse II,* supra*,* at 501; *Grosvenor Resort*, supra, at 1243 (Hernandez) and 1251-1252 (Quevedo). As noted above, the issue of whether discriminatee made a reasonable search for work is based upon the entire backpay period and not on isolated portions of that period. In this connection, the Board has observed, "After an employee has been discriminatorily discharged, and while unemployed, he is not required to spend 8 hours a day, 5

days a week searching for work . . .” *St. George Warehouse II*, supra, at 502; *D. L Baker Inc.*, 351 NLRB 515, 535 (2007). Thus, the fact that there are brief periods of time when Dotson’s employment and expense report does not reflect visits to employers does not detract from the overall record of diligence that he displayed in seeking employment.

During the backpay period, Dotson was able to find some employment through temporary agencies and the Respondent produced no evidence to establish that he left any of his temporary employment for any reason other than that the employer no longer needed his services.

In determining whether Dotson made a reasonable search for interim employment, I have also considered the newspaper ads that the Respondent introduced into evidence and the testimony of Johnson regarding the availability of warehouse work in the Memphis area during the backpay period. The newspaper ads introduced into evidence by the Respondent reflect that there were approximately 37 positions for warehouse workers that were advertised during the backpay period. The Board has generally given little weight to such evidence in determining whether a discriminatee has made a reasonable search for interim employment. The Board has specifically noted that such evidence does not establish whether the jobs would have been available had a discriminatee applied, or whether a discriminatee would have been hired. *St. George Warehouse II*, supra, at 503-504; *Bauer Group*, 337 NLRB 395, 398 (2002); *Arlington Hotel Co*., supra, at 853.

Similarly, the testimony of Johnson does not serve to establish that Dotson’s search for interim employment did not meet a reasonable standard of diligence. Johnson was not qualified nor presented as an expert witness and I did not consider her testimony to be that of an expert witness. Rather, as noted above, at the time of the hearing Johnson was the Respondent’s regional human resources manager. During the backpay period she was working as a senior account manager for Randstad, a temporary staffing agency operating in the Memphis area. Accordingly, she had sufficient knowledge to testify regarding certain relevant facts in this proceeding. Johnson testified that the positions highlighted by the Respondent in the classified ads were similar to the positions that Dotson performed at the Respondent. Johnson also testified in a general fashion that there were warehouse positions available in the Memphis metropolitan area during the backpay period and, at times during that period; she would have between 100 and 150 employees working in warehouse positions in which she had placed them. There is no evidence that Johnson interviewed Dotson regarding his specific skills or the difficulty he may have had seeking employment from some employers, depending upon their geographic location, because of his lack of reliable transportation. There is also no evidence that Johnson contacted any of the employers who placed ads in the newspaper during the backpay period to determine whether any of the advertised positions were still available at the time the ad ran or to determine precisely the necessary skills for the positions available, and whether Dotson was qualified for the position. Thus, I find that Johnson’s testimony regarding the fact that Dotson was a warehouse worker and that there were available warehouse jobs in the Memphis area during the backpay period does not establish that the search for work undertaken by Dotson during the backpay period was unreasonable.

I note that in the analogous situation of a Respondent presenting an expert witness who gives an opinion that a discriminatee did not make a reasonable search for work based on data,

such as newspaper ads reflecting available jobs, the Board has consistently found such testimony to be insufficient to establish that a discriminatee did not make a reasonable effort to find interim work. *St. George Warehouse II*, supra at 504; *Parts Depot, Inc*. 348 NLRB 152 fn. 6 (2006); *Taylor Machine Products*, 338 NLRB 831, 831-832 (2003), enfd. 98 Fed. Appx. 424 (6th Cir. 2004).

On the basis of the foregoing, I find that Dotson made reasonable good faith effort to find interim employment during the backpay period. Taking into account his lack of a permanent residence and the lack of reliable transportation during this period, I find that the Respondent has not met its burden of establishing that Dotson did not use reasonable diligence in seeking interim employment. Accordingly, I find that Dotson is entitled to the backpay amount set forth in the compliance specification, plus interest and excess tax liability.

Whether Kurtycz Engaged in a Reasonable Search for Interim Employment

In its brief, the Respondent contends that Kurtycz did not make a reasonable search for interim employment from March 2, 2010 through September 19, 2010 and that her backpay should accordingly be reduced to $4890, from $17,672, the amount sought in the compliance specification as revised.

Facts

Glorina Kurtycz was employed in the Respondent's warehouse at the time that she was unlawfully discharged on March 2, 2010. On April 15, 2011, she was reinstated by the Respondent pursuant to a 10(j) injunction order issued by the Federal District Court for the Western District of Tennessee. Accordingly, the backpay period for Kurtcyz extends from March 2, 2010 to April 15, 2011.

Kurtycz testified that English is not her first language, but the record does not indicate what her native language is. Kurtycz testified in English and testified that she can read English. Kurtycz testified that after her discharge she began to look for other jobs (Tr. 113-114, 136). According to Kurtycz, she went in person to warehouses and dropped off her resume but did not receive any return calls from employers. Kurtycz further testified that she did not write down all of the employers that she went to and personally gave a resume. Kurtycz further testified that she could not recall the names of all the employers she visited. Kurtycz did submit an employment and expense report to the Region during the compliance investigation (GC Exh. 8). Kurtycz testified somewhat equivocally regarding the manner in which she listed the employers she contacted on her employment and expense report. Kurtycz initially testified that she did not write down the names of employers that she personally visited, but listed only those she contacted on line (Tr. 116). Kurtycz later testified, however, that she did not know how she decided which employers to list on her employment and expense form (Tr. 121). Kurtycz testified that when she received the employment and expense form from the Region, she did not pay attention to the portion of the form that indicates: "List **all places** where you **sought employment** this period and lists all **expenses** related to your search for work including mileage, phone calls, out-of-town lodging and meals, moving expenses or any other expenses you incurred to find and keep interim employment." (Emphasis in the original.)

Kurtycz specifically testified that during the period of July and August 2010, in an effort to find work, she personally visited and dropped off her resume at various employers 3 days a week. Kurtycz further testified that she would receive information from a friend regarding employers who may be hiring in the area, and would follow up on that information.

The employment and expense form that Kurtycz filed with the Region reflects the following contacts with employers:

4-2-10	Wire Tech at Aerotek/online	No response
4-31-10	Honeywell Warehouse/online	Rejection letter
5-4-10	Randstad.com/online	No response
6-15-10	Treslogic	No response
6-18-10	Truck Pro	No response
6-30-10	(No employer name)	Not hiring[9]
	3530 E. Raines Rd.	

Kurtycz obtained temporary employment through a temporary agency, Select Staffing, and worked from September 19 through September 25, 2010 and earned $206.63. Her hourly rate of pay for the work performed through Select Staffing was $7.25 an hour. Kurtycz continued to search for work and on October 1, 2010, Kurtycz found work through another temporary agency, Diversified, and worked continuously through Diversified[10] until she was reinstated by the Respondent on April 15, 2011. Kurtycz' hourly rate of pay for the work performed through Diversified was $9 an hour.

I found Kurtycz to be a credible witness and credit her testimony regarding her search for interim employment. While Kurtycz displayed some difficulty in speaking English, I found that her demeanor reflected a sincere desire to testify truthfully and completely regarding her search for work. I believe that her lack of proficiency in English played a part in her not focusing on the direction in her employment and expense report form to list all of the employers that she contacted. I further find that her failure to follow that instruction was inadvertent and not intentional. Because of her failure to follow that instruction, the list of employers she contacted on the form is not the sum total of her contacts with employers. Thus, based on Kurtycz' credited testimony, I find that during the backpay period from March 2 through September 19, 2010, in addition to the employers listed on her employment and expense form, Kurtycz visited employers and left a resume on at least a weekly basis.

[9] Kurtycz' employment and expense report reflects mileage for Treslogic, Truck Pro and the employer at 3530 E. Raines Rd. I find that this establishes that Kurtycz visited these employers in person and that her testimony that her employment and expense report only listed employers she contacted online is incorrect. Rather, I find that her employment and expense report lists employers that she contacted online and some of the employers she visited personally.

[10] The W-2 form that Kurtycz received for 2010 reflects that she was paid by an entity named Frankcrum 11, Inc. This is also the entity named in the Social Security earnings report for Kurtycz in 2010 and 2011. This report reflects earnings of $3408 in 2010 and $5182 in 2011.

Analysis

In determining whether Kurtycz made a reasonable search for interim employment during the period from March 2, 2010, through September 19, 2010, I have applied the principles expressed in the cases set forth above in my analysis of Dotson's search for interim employment. Applying those principles, I find that, based on Kurtycz' credited testimony and the information submitted on her employment and expense form, she made a reasonable search for interim employment during the period from March 2, 2010, through September 19, 2010.

In this connection, shortly after being unlawfully discharged, Kurtycz began to personally visit employers and drop off her resume on at least a weekly basis. During the period of July and August 2010, Kurtycz would visit employers and drop off her resume two or three times per week. In addition, she contacted employers online. As noted above, the Board considers the entire backpay period in determining whether a discriminatee has made a reasonable search for work and does not focus on isolated portions of that period. The fact that the employment and expense report of Kurtycz does not contain all of the employers that she contacted prior to September 19, 2010 does not serve as a basis to disqualify her from backpay. Kurtycz' inability to recall the names of all the employers that she personally visited searching for work during that period also does not preclude her from receiving backpay during this period. The Board has long held that poor recordkeeping and uncertainty of memory does not serve as a basis to disqualify a discriminatee from backpay. *Cibao Meat Products*, 348 NLRB 47 (2006); *E & L Plastics Corp*., 314 NLRB 1056, 1057 (1994); *December 12, Inc*., 282 NLRB 475, 477 (1986); *Pat Izzi Trucking Co*., 162 NLRB 242, 245 (1966), enfd. 395 F.2d 241 (1st Cir. 1968).

The reasonable diligence of Kurtcyz in seeking interim employment is further demonstrated by the fact that after she obtained work through Select Staffing, she continued to search for work and found employment through another temporary agency, Diversified, at a higher rate of pay. Kurtycz then worked continuously through Diversified for Frankcrum 11, Inc., until she was reinstated by the Respondent.

I have also considered the newspaper ads that the Respondent introduced into evidence and the testimony of Johnson in reaching my conclusions regarding the reasonably diligent search for interim employment made by Kurtycz. As I discussed in detail above in the section of this decision regarding Dotson, the Board has generally given little weight to newspaper ads indicating that there were jobs available in the relevant geographic area during the backpay period. With respect to the applicability of the ads introduced in this case to Kurtycz' search for interim employment, Johnson admitted, that Kurtycz had not operated lift equipment for the Respondent and therefore the ads that required forklift experience would not be applicable to her. Thus, the classified ads have even less probative value regarding the search for interim employment made by Kurtcyz than they do for Dotson.

I also note that with respect to Johnson's testimony regarding the availability of warehouse positions in the Memphis metropolitan area during the backpay period, the evidence establishes that on May 4, 2010, Kurtycz filed an online application with Randstad and received no response. At that time, Johnson was a senior account manager for Randstad and had some success in placing individuals in warehouse positions during the backpay period. However, Randstad failed to make any response to Kurtycz' application for employment with it. I can only

conclude that Randstad did so because it did not believe there was a strong likelihood of placing Kurtycz with an employer. Thus, it is clear that Johnson's testimony regarding the availability of warehouse positions in the Memphis area during the backpay period in no way establishes that Kurtcyz failed to exercise reasonable diligence in her search for employment.

After considering all the foregoing, I conclude that the Respondent has not met its burden of establishing that Kurtycz did not use reasonable diligence in seeking interim employment and thus find that she is entitled to the backpay amount set forth in the compliance specification, plus interest and excess tax liability.

Whether Smith Willfully Concealed Earnings

In its brief, the Respondent contends that Smith's backpay award must be reduced because of his willful failure to disclose interim earnings. The Respondent also asserts that Smith voluntarily left an interim employer and then returned at a lower rate of pay and that the Respondent should be credited for the difference. The Respondent contends that Smith's backpay award should be reduced to $4088, from $8383, the amount sought in the revised compliance specification.

Facts

Smith worked at the Respondent's warehouse from October 15, 2007, until his unlawful discharge on August 28, 2009. On April 15, 2011, Smith was reinstated by the Respondent pursuant to a 10(j) injunction order issued by the Federal District Clerk for the Western District of Tennessee. Accordingly, the backpay period for Smith extends from August 28, 2009, to April 15, 2011.

Smith began to look for work shortly after his discharge from the Respondent. The employment and expense report that he submitted to the Region (GC Exh. 5) reflects the following:

9-15-09	Ashland Chemical	Not hiring
9-15-09	DHL	Not hiring
9-24-09	Flyway Logistic	Not hiring
9-30-09	Prologistix	No jobs available
10-6-09	Trane	Not hiring
10-15-09	Methodist (Germantown)	Hired

Smith began working for Methodist Hospital in Germantown, Tennessee, on October 15, 2009.[11] Smith worked on full-time basis for Methodist Hospital in Germantown until he transferred to Methodist University Hospital in downtown Memphis on or about October 10, 2010 (GC Exh. 5, p. 6.) The record does not indicate the nature of the work that Smith performed at either facility. According to Smith's credited testimony, he transferred to a night shift at Methodist Hospital in Memphis so he could attend school during the day. Smith also credibly

[11] I take administrative notice that Germantown, Tennessee is located 21 miles to the east of downtown Memphis, Tennessee.

testified that there was no break in service and his rate of pay remained the same after the transfer.[12] Smith continued to work on a full-time basis for Methodist Hospital until he was reinstated by the Respondent in April 2011.

While he was working full time at the Methodist Hospital facility in Germantown, Smith also took a part-time job for Service Master cleaning office buildings for approximately 4 hours a night, 5 nights a week, for approximately 2 months. According to Smith's employment and expense report that he filed with the Region, he began working for Service Master on March 25, 2010 and was paid $8.25 an hour (GC Exh. 5, p. 3). Smith testified that he had to give up the part-time job with Service Master because he had transportation problems in getting to work. The employment and expense report Smith submitted to the Region for the period from January 1 to March 31, 2010, reflects that Smith earned $873 from Service Master. With respect to the dates of employment that were covered for this employment, Smith's employment and expense report indicates "3/2010-Present" (GC Exh. 5, p. 3). Smith's report does not have a date stamp or any other indication as to when it was filed with the Region. Thus, I cannot determine for what period of time Smith was reporting earnings from Service Master. Smith's Social Security earnings report indicates that he received $1700.49 from an entity named Complete Facilities Maintenance during 2010 (GC Exh. 4, p. 5). Smith testified that while he did not recognize that name, it may have been for the work he performed for Service Master. There is no evidence that Smith worked for any other employers during 2010 other than Methodist Hospital and Service Master. I find, based on the record as a whole, that the earnings shown on Smith's Social Security earnings Report as emanating from Complete Facilities Maintenance are, in fact, the earnings he received from his part-time job at Service Master cleaning offices in the evening.

The record indicates some discrepancy between the earnings from Methodist Hospital that Smith reported on his employment and expense form and the earnings from Methodist Hospital on Smith's Social Security earnings report. According to Warner's credited testimony, in determining quarterly interim earnings for Smith as set forth in Revised Exhibit 4-Revised, she relied on the Social Security earnings report as she determined that the earnings reported by Social Security were more accurate than the earnings self-reported by Smith in his employment and expense forms. In this connection, on Smith's employment and expense form for the third quarter of 2009, from July 1 through September 30, 2009, he indicated that from "10/15/09 to the Present," he earned $6691.81 from Methodist Hospital (GC Exh. 5, p.1). Since there is no indication as to when Smith filed this document, it is unclear as to the time period he was reporting for. Clearly, it was not for the third quarter of 2009, since Smith did not begin working for Methodist Hospital until October 15, 2009, which is in the fourth quarter. Similarly, for the

[12] I credit Smith's trial testimony on this point. Warner testified that it appeared from Smith's employment and expense report that he may have left Methodist Hospital and returned at a slightly lower pay rate and that she tried to clarify that point during the compliance investigation. According to Warner, Smith appeared to be confused about his pay rate (Tr. 73). Warner attempted to obtain payroll records regarding Smith from Methodist Hospital but Methodist Hospital would not provide the information. (Tr. 73-74). I find that Smith's unequivocal testimony regarding the fact that he had no break in service when he transferred from one Methodist hospital facility to another and that his pay rate remained the same to be the most reliable evidence on this point. His demeanor while testifying regarding this issue reflected certainty.

fourth quarter of 2009, from October 1 to December 31, 2009, Smith reported earnings from Methodist Hospital in the amount of $4482.53. Smith's Social Security earnings report indicates that Smith earned $3841.80 from Methodist Hospital for the entire year in 2009. Accordingly, Warner relied on the Social Security earnings report in determining Smith's interim earnings for the fourth quarter of 2009. (Exhibit 4-Revised, p. 1.)

The discrepancy between Smith's Social Security earnings report and the amounts indicated on his employment and expense report form continued throughout 2010. Warner relied upon the Social Security earnings report and determined that Smith's quarterly interim earnings for the first three quarters of 2010 was $4861 a quarter. For the fourth quarter of 2010, Smith's interim earnings were listed as $5510 in the compliance specification (Exhibit 4-Revised, pp. 2-4). In Smith's employment and expense report for the first quarter of 2010, January 1 to March 31, 2010, he indicated that from "10/2009-present" he earned $7932.42 from Methodist Hospital. Smith also indicated on his employment and expense report that "Some of the above total for Methodist was included in the last expense report." For the second quarter of 2010, from April 1 to June 30, 2010, Smith indicated on his employment and expense form that his dates of employment were "3/28/10-6/25/10," and reported earnings of $3720.20 from Methodist Hospital. For the third quarter of 2010, from July 1, 2010 to September 30, 2010, Smith reported earnings of $3772.74. For the fourth quarter of 2010, from October 1 to December 31, 2010, Smith reported earnings of $3776.29. Finally, for the first quarter of 2011, Smith indicated on his employment and expense form that he earned $3604.63.

When questioned by Respondent's counsel at the hearing, Smith testified that in compiling the information he submitted in his employment and expense report forms, he used the hourly wage that he was making and multiplied that number by the number of hours or months that he worked. Smith credibly testified that he did not intentionally fail to disclose any of his earnings during the backpay period. Smith was unable to explain the discrepancy between the amount of interim earnings set forth in Exhibit 4-Revised of the compliance specification that were above the amounts submitted in his employment and expense report forms.

Analysis

The Respondent contends that Smith willfully failed to disclose earnings that he received from Methodist Hospital for the second, third and fourth quarters of 2010, as well as the first quarter of 2011 and thus is not entitled to any backpay for those quarters. The Respondent further contends that Smith also willfully failed to report his employment with Complete Facilities Maintenance during 2010. The Respondent asserts that because it cannot be determined in which quarter this alleged nondisclosure occurred, Smith should be disqualified from receiving backpay for the first quarter of 2010, in view of the Board's policy to deny all backpay to claimants whose intentionally concealed employment cannot be attributed to a specific quarter or quarters.

In *Cibao Meat Products*, 348 NLRB 47 (2006), the Board stated the principles applicable to the resolution of Smith's case as follows:

> In *American Navigation Co*., 268 NLRB 426, 428 (1983), the Board stated that it would deny backpay for any quarters in which a discriminatee has willfully

concealed interim employment. The Board further stated that this remedy will be applied "only in cases where the claimant is found to have willfully deceived the Board, not where the claimant, through inadvertence, fails to report earnings." See also *Hager Management Corp*., 323 NLRB 1005, 1007 (1997) (same); *Brown Co*., 305 NLRB 62, 67-68 (1991) (same). Thus, "poor recordkeeping and uncertainty of memory, and perhaps exaggeration" do not automatically disqualify an employee from receiving backpay. *Pat Izzi Trucking Co*., 162 NLRB 242, 245 (1966), enfd. 395 F.2d 241 (1st Cir. 1968).

In the instant case, it is clear that Smith did not willfully withhold information from the Board concerning the employers that he worked for and his interim earnings during the backpay hearing. With respect to his employment at Methodist Hospital, during the backpay investigation, Smith consistently filed employment and expense reports reflecting his employment there. I also find that Smith made a good faith effort to accurately report his earnings. While the Respondent focuses on the quarters in which Smith's employment and expense reports earnings are lower than those reported on his Social Security earnings report, as noted above, there are quarters where Smith reported income above that reflected on his Social Security earnings report. It is clear that the method used by Smith to self-report his earnings was not particularly accurate, but it certainly does not serve to establish that it reflects an intention to willfully underreport his earnings. The mere fact that there is a discrepancy between the earnings from Methodist Hospital reported by Smith and the earnings reported by Social Security does not establish a willful intent by Smith to deceive the Board regarding his interim earnings. The Respondent has the burden of proof in establishing interim earnings to be deducted from backpay, including demonstrating that there was a willful concealment of those earnings. *Cibao Meat Products*, supra, at 48; *Atlantic Limousine, Inc.,* 328 NLRB 257 (1999); *Paper Moon Milano*, 318 NLRB 962, 963 (1995). The Respondent simply produced no evidence in the instant case to establish that the discrepancies reflect willful concealment of earnings from the Board.

As noted above, Warner utilized the earnings report submitted by the Social Security Administration in determining Smith's quarterly interim earnings set forth in Exhibit 4-Revised of the compliance specification in 26-CA-023497 et al., as she determined that they represented a more precise record of those earnings. Thus, since Smith had no role in the preparation of Exhibit 4-Revised it is hardly surprising that he was unable to explain the discrepancies between his self-reported interim earnings and those ultimately set forth in the compliance specification, as revised. Importantly, all of the discrepancies in the amount of earnings reflected by Smith's self-reports and the earnings set forth in his Social Security earnings report for the quarters complained of by the Respondent were resolved in favor of the Respondent.

With regard to the Respondent's contention that Smith willfully failed to report earnings from Complete Facilities Maintenance and that he should be ineligible for backpay during the first quarter of 2010, I find that the earnings reported to the Social Security Administration by an entity named Complete Facilities Maintenance is, in fact, for work performed by Smith in a part-time job for an entity he knew as Service Master. As set forth above, Smith did inform the Region of his employment with Service Master in his employment and expense report.

The fact that there is a discrepancy between the amount that Smith reported as earning from Service Master and the earnings reflected on Smith's Social Security earnings report from

Complete Facilities Maintenance is of no moment. As set forth above, Smith's earnings through Service Master (Complete Facilities Maintenance) were for part-time work cleaning offices. During the time that Smith was performing this part-time work for Service Master, he was also working full-time at Methodist Hospital. The Board's policy is that if a discriminatee is working full-time during the backpay period and takes a second job, only the earnings from the full-time job are deducted from backpay. This is so because interim earnings based on hours in excess of those available at the Respondent are not deductible from backpay. *United Aircraft Corp*., 204 NLRB 1068, 1073-1074 (1973); *EDP Medical Computer Systems*, 293 NLRB 857, 858 (1989). See also *NLRB Casehandling Manual (Part Three) Compliance, Section 10554.4*. Accordingly, the part-time work that Smith performed through Service Master (Complete Facilities Maintenance) is not deductible from the gross backpay he is owed.

There is also no merit to the Respondent's contention that Smith's backpay should be reduced because he left his interim employer, Methodist Hospital, and returned at a lower rate of pay. As set forth above, based on Smith's credited testimony, I find that he never left his employment at Methodist Hospital and his pay rate remained the same after his transfer to the Methodist University Hospital in downtown Memphis.

Accordingly, on the basis of the foregoing, I find that the Respondent has not carried its burden of proving that the General Counsel's interim earnings set forth in Exhibit 4-Revised of the compliance specification are inaccurate and I shall order the Respondent to make Smith whole by paying him that amount, with interest and excess tax liability.[13]

Whether the Compliance Specification in 26-CA-023675 et al. Sets Forth the Appropriate Backpay Period and Gross Backpay Formula for Glenora Rayford (Whitley)

Background

In the underlying unfair labor practice case, the Board found that the Respondent violated Section 8(a)(3) and (1) of the Act by denying Rayford overtime in the Remington department beginning on November 17, 2009. The Board ordered that the Respondent offer Rayford overtime in the Remington Department as it did before November 17, 2009, and make her whole for any loss of earnings and other benefits from that date, to the date a proper offer of overtime was made, plus interest. 357 NLRB 1456, 1508 (2011).

The Procedural Issue

In the compliance specification in 26-CA-023675 et al, the General Counsel alleges that the backpay period for Rayford begins on November 18, 2009 and "ends around December 31,

[13] Although the Respondent did not raise this issue in its brief, I find that Smith's commencement of his search for interim employment on September 15, 2009, meets the standards set forth in *Grovenor Resort*, supra, regarding when a discriminatee must begin a search for interim employment. In making this finding I have taken into account the transportation problems that Smith encountered after his discriminatory discharge, which included the repossession of one of his automobiles.

2011." The compliance specification alleges in Exhibit 4 that Rayford is owed $11,821 in backpay, plus interest.

In its answer to the compliance specification in 26-CA-023675, the Respondent denied that the backpay calculations for Rayford were correct, but did not include a proposed alternate formula or supporting figures for calculating Rayford's backpay (GC Exh. 1(j), section 4). At the hearing, over the General Counsel's objection, the Respondent introduced billing records for the Remington account for the period from November 8, 2009, until April 30, 2011 (R. Exh. 8), which it claims allows for a more accurate calculation of the backpay owed to Rayford. At the hearing and in his posthearing brief, the General Counsel contends that pursuant to the Board's Rules and Regulations, Section 102.56(b) and (c), the Respondent should be precluded from having these records considered.

In relevant part, Section 102.56(b) provides that:

> As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

Insofar as relevant, Section 102.56(c) provides:

> If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

At the hearing, when I questioned counsel for the Respondent as to why the answer, with respect to the allegations regarding the backpay owed Rayford, did not contain a detailed explanation of the Respondent's position with the appropriate supporting figures, he replied that he only became aware of the availability of the records contained in Respondent Exhibit 8 on Thursday, August 25, 2016, shortly before the hearing began on Monday, August 29, 2016.

After duly considering the briefs of the parties regarding this issue, I have decided to adhere to my ruling at the hearing and allow Respondent's Exhibit 8 to remain in the record and to consider the merits of the Respondent's position based on that exhibit. I note that Section 102.56(c) provides that the Board may find the allegations of the specification to be true and preclude a respondent from introducing evidence to controvert the allegation only when the failure of a respondent to comply with the specific requirements of Section 102.56(b) is not adequately explained. I find that the explanation of counsel for the Respondent at the hearing to be adequate as to why the Respondent's answer was not more specific regarding the allegations made with respect to the backpay owed Rayford. Under the circumstances of this case, I am

reluctant to preclude the Respondent from having its position addressed on the merits by a strict application of Section 102.56 (b) and (c) of the Board's Rules and Regulations.

In reaching this decision, I find *Electrical Workers IBEW Local 3 (Fischbach & Moore)*, 315 NLRB 1266, 1268 (1995), relied on by the General Counsel in support of his argument that I should not consider the Remington account billing records contained in Respondent Exhibit 8, to be distinguishable. In that case, the administrative law judge granted the General Counsel's motion precluding certain evidence from being presented at the hearing regarding the backpay period because the answer did not comply with Section 102.56(b). There, however, it was clear that the respondent had the necessary payroll records to meet the specificity that is required by Section 102.56(b) when it filed its answer. In the instant case, the records necessary to support the Respondent's position were not discovered until shortly before the hearing and thus I find the situation presented is a different one.

The Backpay Period

The Respondent contends that the backpay period for Rayford should extend to April 13, 2011 and not December 31, 2011 as alleged in the compliance specification. The Respondent argues that Rayford was informed by a letter dated April 11, 2011, that, upon her request, she would be assigned available overtime work in the Remington department. The Respondent also argues that because the district court's April 5, 2011, 10(j) order was posted in Rayford's work area, she should have known that she could return to working overtime in the Remington department.

Facts

Compliance officer Warner testified that during the compliance investigation Rayford stated that she had never received a letter offering her available overtime if she wished to work in the Remington department. According to Warner, the Respondent submitted a copy of a letter that it had allegedly sent Rayford accompanied by an affidavit from an individual attesting that the letter had been sent. Warner testified that the Respondent did not supply documentation to show a signed receipt establishing that Rayford had, in fact, received the Respondent's letter. Warner further testified that Rayford had stated to her that while she had continued to ask for overtime work in the Remington department during the backpay period, she grew tired of making such requests without success, and quit asking for work in the Remington department in 2012. Warner also noted that the Board's order in the underlying unfair labor practice case issued in November 2011 and that the General Counsel determined that Rayford should have been put on notice that if she wanted to work overtime in the Remington department, she should have continued to ask for such work beyond 2011. Warner testified that, under the circumstances, the General Counsel determined that it was appropriate to end the backpay period as of December 31, 2011.

Evangelia Young, the Respondent's former regional human resources manager, testified that pursuant to the district court's 10(j) order with respect to Rayford, she prepared and signed the following letter (R. Exh. 5):

April 11, 2011
Glenora Rayford
(Address omitted)[14]

Dear Glenora:

Pursuant to Judge May's order of April 5, 2011, OHL reminds you that you are allowed to work overtime in the Remington account when overtime is available. If you want to work overtime in the Remington account, please let me know the dates and times that you are requesting to work. If overtime work is available in the Remington account during the times that you request, and I will see to it that you are scheduled to work that overtime.

Sincerely,

Van Young
Regional HR Manager

Young testified that she directed Dani Bowers, a human resources assistant, to prepare a FedEx shipping label for letters, including Rayford's, that the Respondent was sending to employees pursuant to the district court's 10(j) order. Young requested Bowers to track all of the letters to ensure that they arrived and also instructed her to put the tracking information in each employee's file. At the trial Young identified a FedEx shipping document (R. Exh. 1). This document contains a FedEx tracking number and reflects a shipping date of April 11, 2011, and a delivery date of April 13, 2011, at 11:13 a.m. The shipping document does not contain an address and reflects that the letter was "Signed for by R. Whitney." There is a handwritten notation on the FedEx shipping document indicating "This is for Gloria Rayford's fed ex delivery." Young testified that she instructed Bowers to make that handwritten notation on the shipping document after it was received by the Respondent from FedEx.

Rayford testified that she had never received by mail the letter from the Respondent dated April 11, 2011. Rayford further testified that she had never seen the letter prior to the hearing. Rayford testified that in April 2011, she lived at the address contained in the letter with Archie Clad Whitley, who she later married in May 2012.[15] Rayford also testified that no one from her family or Whitley's family had a first name that started with the letter R.

Rayford also testified that in 2011 she was aware that the district court had ordered an order against the Respondent because it was posted in the break room of the Waterpik department at the Respondent's facility that she normally worked in. Rayford also testified, however, that she was not aware that the order indicated that she could start working overtime in the Remington department.

[14] For privacy reasons I have omitted the address contained in the letter.
[15] It was not until she married in May 2012 that Rayford began to use the last name Whitley.

According to Rayford, she continued to request to work overtime in the Remington department through her supervisors in the Waterpik department on a monthly basis for approximately 2 years. According to Rayford, she was always told "no" and that other employees were going to work overtime in the Remington department. Rayford testified that she had to receive the approval of her supervisor in the WaterPik department before she could work overtime in the Remington department. In this connection, Rayford testified that she was informed by the human resources department that she had to go through the chain of command beginning with her supervisor regarding working overtime in the Remington department.

I credit Rayford's uncontradicted testimony in its entirety. Rayford testified in a thorough and detailed manner and her demeanor while testifying reflected a sincere desire to testify truthfully. In addition, I find that her testimony is inherently plausible when considered with other record evidence.

Analysis

The Board has applied the "mailbox rule" which provides that proof of the mailing of a document gives rise to a rebuttable presumption that the document has been received by the individual or entity to whom it was mailed. *San Juan Teachers Association*, 355 NLRB 172, 175 (2010).

In the instant case, based on Young's testimony and supporting documents, I find the evidence is sufficient to establish that the Respondent mailed a letter through FedEx to Rayford at the address listed in the letter. Thus, a rebuttable presumption that Rayford received a letter has been established. Based on Rayford's credited testimony, however I find that the presumption of receipt of that letter has, in fact, been rebutted. As noted above, I fully credit Rayford's denial that she, in fact, ever received the Respondent's April 11, 2011 letter regarding an opportunity to work in the Remington department. There is no evidence that Rayford ever signed for the receipt of the letter addressed to her and mailed by the Respondent through FedEx. The FedEx shipping document does not contain the address to which the letter was purportedly delivered and the letter was signed for by an individual named "R. Whitney." In April 11, 2011, Rayford was living with her then fiancé, Archie Whitley but no one else was living at the home. In addition, there is no one in either Rayford's family or Whitley's family that has a first name beginning with the letter R. Under all the circumstances, Rayford's denial that she ever received the letter is inherently plausible. Accordingly, I find that Rayford did not, in fact, ever receive the Respondent's April 11, 2011, letter regarding the availability of overtime for her in the Remington department.

I also find there is no merit to the Respondent's contention that the posting of the district court's 10(j) order in the Waterpik department at some point in 2011 that is undetermined in this record is sufficient to have put Rayford on notice that such overtime was available to her and therefore her backpay period should be cut off on or about April 13, 2011. The Respondent did not introduce the 10(j) posting into evidence in this proceeding, so the record does not contain the exact language of the order or the date it was posted. Assuming that the District Court's order is similar to the Board's order regarding the Respondent's responsibility to ensure that Rayford was aware that she had the right to request overtime in the Remington department, the Board's order specifically required that the Respondent "offer Glenora Rayford overtime in the

Remington department to the extent that overtime is available for employees who were assigned to accounts other than the Remington department." 357 NLRB at 1509. As noted above, Rayford never received such an offer from the Respondent. Rather, Rayford's credited testimony establishes that at least through the end of December 2011, she consistently requested permission from her immediate supervisor in the WaterPik department to be given the opportunity to work overtime in the Remington Department but was denied that opportunity.

On the basis of the foregoing I find that the backpay period for the loss incurred by Rayford because of the Respondent's unlawful discrimination against her regarding overtime in the Remington department runs from November 18, 2009 through December 31, 2011.

The Formula for Gross Backpay Regarding Rayford

Facts

In order to calculate the backpay for Rayford during the backpay period, Warner testified that during the compliance investigation she requested the Respondent to provide payroll records reflecting the overtime hours worked by employees in the Remington Department by employees, like Rayford, who were not normally assigned to the Remington Department for the backpay period. Warner was informed by the Respondent that it no longer had payroll records for the Remington department during this period. Warner then reviewed the record in the underlying unfair labor practice case and located payroll records for Rayford reflecting her work hours from August 11, 2009 to July 2, 2010, including her overtime hours in the Remington Department prior to November 18, 2009. (GC Exh. 10.) Warner also discovered payroll records in the record of the underlying unfair labor practice proceeding for employees Alfred Stewart, Alvin Fitzgerald and Wanda Staples for the period from November 1, 2009, to May 21, 2010, reflecting the overtime hours worked by these three employees in the Remington department. (GC Exh. 11.)

Because the Respondent was unable to provide any payroll records relevant to the calculation of gross backpay for Rayford, Warner utilized the records available to her and found all situations in which these documents reflected that Rayford or Stewart, Fitzgerald and Staples, the comparator employees, worked overtime in the Remington department. Relying on the overtime hours worked in the Remington department by Rayford (GC Exh. 10) and the comparator employees (GC Exh. 11), Warner compiled Exhibit 3 which is attached to the compliance specification in 26-CA-023675. (GC Exh. 1(h).)

Exhibit 3 of the compliance specification in 26-CA-023675 et al., indicates that Rayford worked overtime in the Remington department on 5 days between October 19 through November 17, 2009 (October 19, 20, 21, and 26 and November 17). Exhibit 3 also reflects that Rayford worked overtime on Saturday, September 26, 2009, and Sunday, September 27, 2009. In the underlying unfair labor practice trial, Rayford testified that she started working overtime in the Remington Department in July 2009 and that overtime work in that department was generally available during the third and fourth week of each month. Rayford testified that in July 2009,

she worked approximately 2 days of overtime in the Remington department. (R. Exh. 2)[16] Exhibit 3 indicates that all three comparator employees performed weekend overtime work in the Remington department in both February and March 2010.

Based on the records she had available regarding Rayford's overtime work in the Remington Department, Warner determined that Rayford would have worked 3 weekdays per month in the Remington department and one weekend per month. Warner determined that for the 3 weekdays, it was reasonable to conclude that Rayford would have worked 7.61 hours of overtime. This was the actual number of overtime hours that Rayford worked from October 19 through October 21, 2009. Warner determined that the hours that Rayford had worked on weekend overtime was consistent with the number of hours of weekend overtime worked by the comparator employees. Thus, for the purpose of calculating weekend overtime, Warner used the 21.61 hours of overtime that Rayford had worked on September 26 and 27, 2009. Multiplying those hours by the overtime pay rate of $15.65, Warner's calculations reflected that Rayford's gross backpay was $457 a month.

Warner testified that in determining the gross backpay formula with respect to Rayford, there was a short period of time from when Rayford first began to work overtime in Remington department in July 2009 until she was discriminatorily precluded from doing so on November 17, 2009. Thus, the historical record of Rayford's performance of overtime work in the Remington department was limited. According to Warner, without additional records from the Respondent, she could not determine more precisely a formula that would indicate the availability of overtime work in the Remington department for employees like Rayford who worked full time in other departments. Warner further testified that while the limited payroll records she had available to her did not establish that the comparable employees worked one weekend each month in the Remington department, those records did not establish that overtime was unavailable on a monthly basis. These records also did not establish whether the comparator employees simply did not volunteer for overtime that was available.

As noted above, in its answer to the compliance specification in Case 26-CA-023675, the Respondent denied that Rayford would have worked the amount of overtime alleged in the compliance specification. The Respondent alleged that the specification was not correct because it did not account for monthly differences in the amount of overtime worked. However, in its answer, the Respondent did not propose another formula to determine the backpay liability or provide any supporting figures to support a lower backpay figure.

In its brief, the Respondent contends that Warner's assumption that Rayford would have worked one weekend of overtime each month is arbitrary. In this regard, the Respondent contends that the payroll records of Rayford establish that she worked only one weekend of overtime in September 2009 in the Remington department during the period from August 11, through November 17, 2009. The Respondent notes that no overtime was worked in August, October, or November 2009. The Respondent also asserts that the records for the comparator

[16] Because the payroll records introduced into evidence in the underlying labor practice proceeding, that were used by Warner in the compliance proceeding, began on August 11, 2009, the amount of overtime hours worked by Rayford in July 2009 could not be included in Warner's backpay calculations.

employees establish that for the period between November 1, 2009 and May 21, 2010, those employees had worked weekend overtime only on February 27 and 28, 2010, and March 27, 2010. The Respondent contends that it is not reasonable for the General Counsel to assume that one weekend of overtime work in the Remington department would have been available on a monthly basis throughout the backpay period.

As discussed above, at the hearing I permitted the Respondent to introduce into evidence, over the objection of the General Counsel, weekly billing reports for the Remington department for the period from November 8, 2009 through April 30, 2011 (R. Exh. 8). The Respondent introduced this document through Johnson, who testified that in order to locate "non-Remington" employees who worked voluntary overtime in the Remington department, it is necessary to locate employees with no entries or low hourly totals in the "Reg. hours" column but with the overtime reported in the "OT Hours" column. Johnson also testified, however, that employees can be transferred to work regular hours from one department to another by a process the Respondent refers to as a "labor loan." According to Johnson, if an employee worked on labor loan the entire week, the employee's hours worked were reflected under the regular and overtime hours in the department in which they were working. Johnson further testified, however, that she could not recall a situation like that happening. Based on the weekly billing reports from the Remington department, the Respondent contends that "Of these ninety-six weekly billing reports, only approximately 11 non-Remington employees worked overtime on the Remington account (R. Exh. 8, pp. 14, 19, 21, 34, 40, 41, 45, 67, 59, 64, 75)." (Respondent's brief, p. 23). The Respondent further contends that these documents rebut the General Counsel's assertion that overtime would have been available to Rayford one full weekend of every month.

The Respondent contends that, considering the record as a whole, it is likely that Rayford would have worked some weekend overtime, but the more reasonable assumption is that she might work overtime every other quarter. Accordingly, the Respondent contends it would be more reasonable to pay Rayford weekend overtime pay at $338.20, the amount calculated by the General Counsel, for 3 full weekends up until what it contends should be the backpay cutoff period of April 13, 2011. The Respondent contends that using the cutoff date of April 13, 2011, and granting Rayford 3 weekends of overtime pay, she is owed $2970 in backpay.

Analysis

As noted above, in *Performance Friction Corp*., supra, the Board and the courts apply a broad standard of reasonableness in approving methods of calculating gross backpay as long as it is not unreasonable or arbitrary. See also *Intermountain Rural Electric Assn*., 317 NLRB 588, 590-591 (1995). The Board has specifically noted that the use of comparable employees is an accepted method in establishing a gross backpay formula. *Performance Friction* supra at 1117; *S. E. Nichols of Ohio*, 258 NLRB 1, 9-11 (1981), enfd. 704 F.2d 921, (6th Cir. 1983). In determining whether the General Counsel's gross backpay formula is reasonable, the Board and the courts resolve any uncertainty regarding the gross amount of backpay owed to a discriminatee in favor of the discriminatee and against the respondent whose violation of the Act caused the uncertainty. *Alaska Pulp Corp*., 326 NLRB 522, 523 (1998), enfd. in part, 231 F.3d 1156 (9th Cir. 2000).

In the instant case, as noted above, Warner only had records regarding Rayford's overtime work in the Remington department from August 11, 2009 until she was discriminatorily denied such work on November 17, 2009. During this time period, Rayford worked 2 weekend days in September 2009 and overtime hours on 5 weekdays.[17] While these records reflect that Rayford did not work weekend overtime in August and October 2009, there was a limited time period in which to consider Rayford's history of performing weekend overtime work in the Remington department. The Respondent provided no records to indicate whether there was weekend overtime available that Rayford could have volunteered for during that period. With respect to the three employees that were used as comparators to Rayford, the records available to Warner reflected that from November 1, 2009 until May 21, 2010, all three employees worked one weekend of overtime in February and March, 2010. Again, Warner did not have records from the Respondent establishing that overtime work was unavailable in the Remington account in the other months for which she had records available or whether the comparator employees did not seek to perform available overtime work in the other months. Accordingly, because of the limited amount of records available to her, Warner constructed a formula for gross backpay for Rayford which resolved any ambiguities in the amount of weekend overtime available during the backpay period in Rayford's favor.

In support of its position that the General Counsel's formula for gross backpay for Rayford is arbitrary and unreasonable, the Respondent contends that the billing records it produced at the compliance hearing establish a more reasonable formula. In its brief, the Respondent makes only a generalized assertion that approximately 11 non-Remington employees worked overtime in the Remington Department between November 8, 2009, and April 30, 2011 without specifying the names and dates of overtime allegedly worked by those employees. Further, the Respondent does not state with any specificity how this information supports its position regarding the appropriate gross backpay amount. Thus, the Respondent has not set forth in detail its position on the premise upon which it would limit the backpay and has not furnished the appropriate supporting figures as it is required to do under Section 102.56(b) of the Board's Rules and Regulations.

In addition, Johnson admitted that employees on labor loan from another department to the Remington department for an entire week would have their regular hours and overtime hours reported as hours worked in the Remington Department on these billing records. Thus, such employees cannot be identified as non-Remington employees who worked overtime in the Remington department. Although Johnson testified she was not aware of a situation where employees were on labor loan for an entire week, nonetheless, this possibility detracts from the Respondent's contention that only approximately 11 non-Remington employees worked overtime in the Remington department for the period covered by the billing records it produced at the hearing. Finally, the General Counsel notes in his brief that the Respondent's billing records do not show comparator employee Fitzgerald working in the Remington department during the week ending March 28, 2010 (R. Exh. 8, p. 19). The General Counsel further notes that the Respondent's timekeeping records used by Warner to calculate Rayford's gross backpay

[17] Since the record clearly establishes that overtime in the Remington department was generally available in the latter part of the month, I do not consider the lack of weekend overtime in November 2009 for Rayford to be a relevant consideration, since she was discriminatorily precluded from such overtime beginning on November 17, 2009.

indicate that Fitzgerald did work weekend overtime in the Remington Department in the week ending March 28, 2010 GC Exh. 11, p. 6).

I find that the Respondent's evidence does not provide a more accurate method of determining what Rayford would have earned in overtime pay in the Remington Department, absent the Respondent's unlawful discrimination against her. The Respondent does not provide a cogent argument as to why its vague reference to approximately 11 non-Remington employees who allegedly worked overtime in the Remington Department for a portion of the backpay period, serves as a more accurate method in determining Rayford's backpay than the formula devised by the General Counsel. This is particularly so when there is a substantial question regarding the reliability of the records produced by the Respondent at the compliance hearing.

Applying the Board's well-established principle that any ambiguity in determining the gross backpay formula must be resolved against the Respondent, I find that under the circumstances present in this case, the General Counsel has used a formula that reasonably ascertains the amount of backpay owed to Rayford as a result of the Respondent's discriminatory refusal to provide to her an opportunity to work overtime in the Remington department during the backpay period.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Ozburn-Hessey Logistics, LLC, its officers, agents, successors, and assigns, shall make whole the individuals named below, by paying them the amounts following their names with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Respondent shall compensate the employees named below for the adverse tax consequences, if any of receiving lump-sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc*., 363 NLRB No. 143, (2016), the Respondent shall file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating backpay to the appropriate calendar year for each employee.

Carolyn Jones	$502.96
Renal Dotson	$33,816.00
Jerry Smith	$8,383.00
Glorina Kurtycz	$17,672.00
Glenora Whitley (Rayford)	$11,281.00

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Dated, Washington, D.C., December 6, 2016.

Mark Carissimi
Administrative Law Judge